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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DWAYNE WYATT, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B288483 (Los Angeles County Super. Ct. No. BC602098)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

McMurray Henriks, Yana G. Henriks, for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Matthew A. Scherb, Deputy City Attorney, for Defendant and Respondent.

Plaintiff and appellant Dwayne Wyatt (Wyatt) sued his employer, the City of Los Angeles (City), alleging the City's decision not to promote him was the result of unlawful discrimination and retaliation for engaging in protected activities. The trial court granted summary judgment for the City on administrative exhaustion grounds, as suggested by an alternative writ previously issued by this court. We are asked to decide whether there is any dispute of material fact over whether Wyatt filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) within one year of the allegedly unlawful conduct—which is a prerequisite for filing suit.

I. BACKGROUND

A. The City's Promotion Process

The City's Personnel Department creates and maintains "List[s] of New Eligibles," which are rolls of candidates who have been deemed qualified for various positions by virtue of their scores on a civil service examination. Each eligibility list ranks candidates by their examination score and is effective for a two-year period. When an actual job opening arises in one of the City's departments, the Personnel Department generates from the applicable eligibility list a shorter "Certification List" of the candidates available for promotion. The hiring department then has 60 days to interview the candidates on the certification list and fill the vacant position(s). After 60 days, the certification list for the vacancy or vacancies expires.

B. November 2013: The City Does Not Promote Wyatt

In 1986, Wyatt, a Black man, began working for the City's Planning Department. Four years later, he was promoted to Associate Planner.

Many years after that, Wyatt was qualified to be included on the eligibility list for promotion to the position of City Planner. This eligibility list was effective for the period from October 30, 2012, to October 29, 2014. The candidates were listed in order of their promotional exam scores, and out of the 55 candidates listed, Wyatt was ranked 23rd.

In October 2013, the City's Personnel Department drew from this longer eligibility list and generated a certification list for promotions to multiple City Planner positions. The certification list was again in ranked exam score order and Wyatt was ranked 14th out of 26 candidates.

Wyatt and 17 others opted to interview for appointment to one of the open City Planner positions. The City's Planning Department ranked the candidates following the interviews, and Wyatt was not among the top candidates; his final ranking was 16th.

Six days after being interviewed, i.e., on November 21, 2013, the City gave Wyatt written notice that he was not one of the nine candidates selected for promotion to City Planner. Five candidates who were ranked higher than Wyatt on the certification list also were not selected for promotion. The rejection letter from the City to Wyatt stated: "Though you were not selected, this is no reflection on your abilities or suitability for other positions or vacancies as they occur. [¶] Additionally, the Department does encourage all eligible employees to participate

in the exam process to fill any future vacancies in this or other classifications."

The certification list for the City Planner vacancies expired on December 2, 2013. Less than a week later, the City's Planning Department issued a department-wide announcement listing the nine employees (not including Wyatt) who had been selected for promotion to City Planner. The Planning Department thereafter made no further requests to generate a certification list for promotion to City Planner during the time Wyatt and others remained on the eligibility list that ultimately expired in October 2014.

C. December 2014: Wyatt Files an Administrative Complaint

On December 15, 2014, more than a year after receiving notice that he had not been promoted to City Planner, Wyatt filed a verified complaint with DFEH. Wyatt's DFEH complaint alleged he "was denied promotion because of my race [African American] and in retaliation for complaining about practices unlawful to the Fair Employment and Housing Act [FEHA]."

Wyatt's administrative complaint expressly alleged "[t]he most recent harm occurred on or around Nov 21, 2013." He elaborated: "On or about November 2013, I applied again for the position of City Planner for which I met the requirements and qualifications. On November 21, 2013, I was denied promotion. To my knowledge nine [9] employees [all non-African American, names on file] were promoted to the position of City Planner. Also to my knowledge, I have more experience and [am] more qualified than all the nine . . . employees[ ] who were promoted."

Several months later, Wyatt asked to withdraw the discrimination complaint he filed with DFEH because he intended to file a private lawsuit. DFEH closed the matter based on Wyatt's withdrawal request and issued him a right to sue letter.

D. Wyatt's Lawsuit and the City's Motion for Summary Judgment

Wyatt sued the City in November 2015, asserting claims for race discrimination, age discrimination, and retaliation. Wyatt alleged the City had wrongfully and routinely passed him over for promotions while others selected for promotion were "less qualified and less experienced." There was no allegation that the creation or use of eligibility or certification lists was itself discriminatory.

Wyatt's lawsuit specifically complained about being passed over for promotion when the City filled the nine City Planner vacancies. Wyatt's original complaint alleged the most recent instance of discrimination occurred "on 12/20/2013 [when] . . . Wyatt was passed over for nine other employees who were promoted to City Planner."[1] Wyatt's first amended complaint stated the "latest instance of rejection for advancement occurred on or around November 21, 2014." Wyatt's second amended complaint—the operative pleading—deleted all language about when the latest instance of discrimination occurred; added language that described his rejection for

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[1] The use of the December 20 date, rather than December 2, 2013, which is when the certification list expired, appears to be an error.

promotion to one of the nine positions filled as "illustrative"; and added a sentence asserting the City's "violations have been continuous."

The City answered Wyatt's second amended complaint and asserted, as one of its affirmative defenses, that "any cause of action based on events occurring prior to December 15, 2013 (exactly one year before Plaintiff's filing of his DFEH charge) is barred by the one-year statute of limitations set forth in [the] Government Code . . . ." (Emphasis omitted.) The City later moved for summary judgment on this ground, arguing Wyatt could not maintain his lawsuit because he failed to properly exhaust administrative remedies: "Given Plaintiff's acknowledgment of non-selection no later than November 21, 2013[,] and the Department of City Planning's public announcement of the new appointments on December 6, 2013, Plaintiff has no excuse for exceeding the one[-]year statute of limitations to file a DFEH charge."

Wyatt opposed the City's summary judgment motion, arguing the one-year deadline to file an administrative charge did not begin running until October 2014 (some nine months after the City Planner position vacancies were filled) because that was when the two-year *eligibility* list expired. In Wyatt's view, the expiration of the eligibility list (which the City maintains even when no job openings are available) was the relevant triggering event rather than the expiration of the certification list because it was possible he might still obtain a promotion if another vacancy were to arise and he were selected

to fill that vacancy.[2] Wyatt also argued the City's "violations" against him had been "continuous."

The trial court initially denied the City's summary judgment motion,[3] finding a triable issue of material fact existed as to "when [Wyatt's] opportunity to obtain a promotion ended." The court believed Wyatt "was on the certification list which expired October 29, 2014," (the nomenclature the court used was incorrect—this was the *eligibility* list) and further found "no evidence was submitted that [Wyatt] could not have interviewed for a position and received a promotion between November 15, 2013, and October 29, 2014."

The City sought mandate review of the trial court's summary judgment ruling. This court issued an alternative writ of mandate, tentatively concluding as follows: "The filing of a Department of Fair Employment and Housing (DFEH) complaint within one year of 'the date upon which the alleged unlawful practice . . . occurred' is a condition precedent to the filing of a civil action. [Citations.] Undisputed evidence demonstrates the violations [Wyatt] identified in his complaint to DFEH and alleged in his first, second, third, and fifth causes of action were

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[2] Wyatt supported his opposition with a declaration in which he explained his decision not to file his DFEH complaint until December 2014 as follows: "[B]ecause I obtained [eligibility] status, I remained open to any possible promotions that my employer was willing to offer me. When my employer failed to promote me after my [eligibility] ended in October 2014, I realized that my employer would likely never promote me."

[3] The trial court granted summary adjudication for the City on Wyatt's common law cause of action for racial discrimination and on his harassment claim. Neither is at issue in this appeal.

complete, at the latest, by December 2, 2013. [Wyatt's] complaint to DFEH, however, was not filed until December 15, 2014. [Wyatt] therefore failed to properly exhaust his administrative remedies prior to filing suit." (*City of Los Angeles v. Superior Court* (Sept. 21, 2017, B284900) [nonpub. opn.].) We directed the trial court to hear the parties' positions and either grant summary judgment for the City or show cause why a peremptory writ should not issue. (*Id*. at p. 2.)

After receiving supplemental briefing and hearing oral argument, the trial court granted summary judgment for the City. The court explained its ruling as follows: "While the Second Amended Complaint alleges [Wyatt] was not promoted because of his membership in protected classes and engagement in protected activities, it does not allege that [the City] maintained a discriminatory promotional eligibility list. Therefore, the pertinent inquiry concerning the [administrative] statute of limitations defense is whether the decision not to promote [Wyatt] occurred within the statutory period. Here, [the City] sent [Wyatt] notice of non-selection for the City Planner position on November 20, 2013[,] and [Wyatt] testified he received it on November 21, 2013. Moreover, the certification list on which Plaintiff appeared and which was the list from which promotions were actually made expired on December 2, 2013. Therefore, [Wyatt] had until December 2, 2014[,] at the latest to file his complaint."

II. DISCUSSION

To bring a civil action under the Fair Employment and Housing Act (FEHA or the Act), a plaintiff must first file an administrative complaint with DFEH and that administrative

complaint must be submitted to the agency no later than a year after the asserted wrong. (Gov. Code, § 12960, subd. (d).) That did not happen here. Wyatt filed a DFEH complaint on December 15, 2014, to complain about having been denied a promotion more than a year earlier, on November 21, 2013. Because he did not timely pursue administrative relief, the trial court correctly ruled he cannot maintain a civil action against the City.

All three arguments Wyatt advances on appeal to avoid this straightforward result are meritless. First, he contends his DFEH complaint was timely because it was filed less than a year after the eligibility list expired. But that is not the relevant date for administrative timeliness purposes. As Wyatt's own DFEH complaint reveals, the adverse action Wyatt challenges is the failure to promote him to one of the nine City Planner positions that were filled by other applicants during the certification list process that ended at the very latest on December 2, 2013. Arguing that Wyatt could wait to complain about his rejection for one of the nine positions filled on the purely speculative possibility that another City Planner vacancy might arise and that he might be hired for that vacancy finds no basis in law or reason. Second, Wyatt argues his claims are saved by the continuing violation doctrine. That argument fails, however, because there is no allegation that the eligibility and certification lists are themselves discriminatory, nor of any unlawful conduct that "continued" after December 2, 2013. Finally, Wyatt asserts the time to file a DFEH complaint should be equitably extended because the City's rejection letter encouraged him to participate in the exam process for any future vacancies. The argument is

forfeited for failure to raise it below, and it is unavailing on the merits regardless.

A. Standard of Review

A trial court must grant summary judgment when no triable issue exists as to any material fact, entitling the moving party to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To defeat summary judgment, the plaintiff must "'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) We review the trial court's grant of summary judgment de novo. (*Id.* at p. 476.) "'While resolution of [a] statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.'" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 (*Romano*).)

B. Wyatt's Claims Are Barred for Lack of Administrative Exhaustion

FEHA prohibits unlawful employment practices, including discrimination on the basis of race and age, or retaliation against a person because he or she has opposed practices forbidden by the Act. (Gov. Code, § 12940, subds. (a) & (h).) The Act requires an employee to "exhaust the administrative remedy provided by the statute by filing a complaint with the [DFEH] and . . . obtain[ing] from the [DFEH] a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. [Citations.] The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under

FEHA." (*Romano*, *supra*, 14 Cal.4th at p. 492; see also Gov. Code, § 12960, subd. (d) [with certain exceptions that do not apply here, "[n]o complaint may be filed [with DFEH] after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred"].)

Thus, when a civil action plaintiff cannot establish he or she filed a complaint with DFEH within a year of the wrong complained of, courts will hold the civil action is barred for lack of proper administrative exhaustion. (See, e.g., *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 323 [lawsuit barred when DFEH complaint filed over one year after last allegedly unlawful act]; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92 [suit barred when DFEH complaint filed more than one year after decision not to hire was communicated to plaintiff] (*Williams*); see generally *Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1411-1412 ["FEHA claims are governed by two statutory deadlines: section 12960 and section 12965. . . . [¶] Section 12960 provides that an employee bringing a[ ] FEHA claim must exhaust the administrative remedy by filing an administrative complaint with the DFEH within one year after the alleged unlawful action occurred. [¶] . . . [¶] Section 12965 concerns a separate statutory deadline applicable *after* the DFEH issues a right-to-sue notice. The code section provides that after an employee files a complaint and the DFEH does not issue an accusation within a specified period, the DFEH must issue a right-to-sue letter notifying the employee that he or she may bring a civil suit within one year of the date of the notice"].)

Here, the undisputed facts establish Wyatt received notice from the City of its decision not to promote him more than a year

before he filed his DFEH complaint. In his response to the City's separate statement of undisputed material facts, Wyatt did not dispute: he received notice that he was not selected for the position of City Planner on November 21, 2013; he received an email on the same date identifying the nine appointments that had been made to the City Planner position and that would be effective on December 2, 2013 (the date the certification list expired); the City's Planning Department sent a memo to all staff on December 6, 2013, listing the names of the nine employees promoted to City Planner as of December 2, 2013; and he did not file his DFEH complaint until December 15, 2014. Wyatt's DFEH complaint also identified the alleged wrong as the denial of promotion on November 21, 2013, and further clarified "[t]he most recent harm occurred on or around Nov 21, 2013." Even in the light most favorable to Wyatt, these facts establish he should have filed his DFEH complaint a year from December 2, 2013, at the latest. Wyatt, however, waited until December 15, 2014, and he therefore did not exhaust his administrative remedies in a timely manner.

We are unpersuaded by Wyatt's position that he could refrain from filing a DFEH complaint within a year of the concrete denial of a promotion in the fall of 2013 because of the speculative possibility the City might have another City Planner opening, and might hire him for that opening, in the months before the City's promotional eligibility list would expire. Wyatt's position is inconsistent with authority that holds failure to promote is a "discrete" act that starts the "clock for filing charges alleging that act." (*National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 113-114.) Wyatt's position is also inconsistent with his own focus in his DFEH complaint and later

court pleadings on the November 2013 failure to promote as the key adverse action alleged.

More fundamentally, Wyatt's position ignores the fact that his rejection for a promotion in November 2013—he says, as a result of unlawful discrimination and retaliation—could not be fully redressed even if he *were* later hired as a City Planner before the eligibility list expired. In that scenario, Wyatt still would be deprived (at a minimum) of the additional interim income from the higher-paid position he was wrongly denied when the other nine appointees were earlier chosen. In addition, Wyatt's theory that the expiration of the eligibility list (not the certification list) is what triggers the administrative filing deadline is at war with the core theory of his lawsuit. The idea that Wyatt would be rejected from promotion to one of the nine open positions but still believe he had not suffered an adverse action because he might be selected for a possible future position by the same City that had been, in the words of his complaint, "routinely pass[ing him] over for promotions" is not one any rational jury could credit.

Bouman v. Block (9th Cir. 1991) 940 F.2d 1211 (*Bouman*) and *Williams*, *supra*, 72 Cal.App.4th 84 are not to the contrary. In *Bouman*, the plaintiff contended Los Angeles County's use of a promotional examination eligibility list was itself discriminatory, as was the County's failure to promote her from that list before it expired. (*Bouman*, *supra*, at p. 1221.) A Ninth Circuit panel held the time to file an administrative discrimination charge should run from the expiration of the eligibility list because it was not certain the plaintiff would not be promoted before that time. (*Ibid.*) But in *Bouman*, unlike here, there was no separate certification list used by the public employer when actual

vacancies arose—positions were filled directly from the eligibility list (and the County suppressed information that there were vacancies to which the plaintiff could have been appointed). (*Id.* at p. 1217.) That is a crucial difference, because we agree Wyatt had a year from the expiration of the certification list here—the functional equivalent of the eligibility list in *Bouman*—to file his DFEH charge. The problem is that the certification list expired on December 2, 2013, more than a year before Wyatt filed his administrative complaint.[4]

The same is true of *Williams*. The Court of Appeal in that case held the trial court correctly ruled the plaintiff could not maintain his discrimination suit because he did not file an administrative complaint within a year of the alleged wrong later challenged. (*Williams*, *supra*, 72 Cal.App.4th at p. 90.) Although the Court of Appeal observed there was evidence the municipal defendant did not rely on the existence of an eligibility list from which promotions were made (*id.* at p. 91), the court had no occasion to comment on the sort of eligibility list the expiration of which might suffice to start the time to file an administrative charge. For the reasons already stated, we hold only the expiration of the certification list in this case, which made final Wyatt's rejection for one of the nine vacancies filled from that list, could serve that function given the allegedly discriminatory adverse action Wyatt alleged. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1250 [the pleadings set the

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[4] Furthermore, the plaintiff in *Bouman* also challenged the list itself as discriminatory, and as discussed *ante* and *post*, Wyatt makes no similar contention with respect to the eligibility and certification lists at issue here.

boundaries of the issues to be resolved at summary judgment].) Wyatt's DFEH complaint was therefore untimely and that means his lawsuit cannot proceed. (*Romano*, *supra*, 14 Cal.4th at p. 492.)

C. The Continuing Violation Doctrine Indisputably Does Not Apply

The continuing violation doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.) An employer's unlawful actions are "sufficiently connected" if they satisfy three criteria: (1) the unlawful conduct occurring outside the statute of limitations is "sufficiently similar in kind" to the unlawful conduct within the limitations period, (2) the unlawful actions have occurred with "reasonable frequency," and (3) they have not "acquired a degree of permanence." (*Id*. at pp. 802, 823 [applying doctrine to claims of disability discrimination and harassment]; *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1059-1060 [extending continuing violation doctrine to a claim for retaliation].)

The continuing violation doctrine cannot apply here to deem Wyatt's DFEH complaint timely because neither the DFEH complaint itself nor his later civil action alleges any facts describing a continuing wrong that persisted after the expiration of the certification list on December 2, 2013. In particular, Wyatt does not allege or argue the City's creation or use of the eligibility and certification lists was itself discriminatory—indeed, he expressly disclaims any such argument in his appellate briefing. That distinguishes this case from authority cited by Wyatt in

support of a continuing violation theory. (See, e.g., *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1053-1054 & fn. 1; *City and County of San Francisco v. Fair Employment & Housing Commission* (1987) 191 Cal.App.3d 976, 982-983 [holding administrative complaint was timely under continuing violation doctrine because the "'unlawful practice' complained of was the adoption of the eligibility list"].) Wyatt's operative complaint and the summary judgment record are also bereft of any facts on which a reasonable jury could find the City unlawfully denied Wyatt a promotion after it filled the City Planner vacancies in the fall of 2013.[5]

D. Wyatt's Equity-Based Arguments for Deeming His DFEH Complaint Timely Are Forfeited and Meritless

Wyatt's opening brief argues his DFEH complaint should be deemed timely under equitable tolling principles. His reply brief then muddies the waters by recasting the argument as one invoking the doctrine of equitable estoppel. The gist of both arguments seems to be that Wyatt should be excused from the ordinary one-year statute of limitations to submit a complaint to DFEH because the City's rejection notice "encouraged [him] to look forward for future opportunities for advancement" and lulled him into believing he could wait to complain about being rejected for a promotion until the eligibility list expired in October 2014.

Wyatt's equity-based arguments are forfeited for failure to raise them in the trial court. (*Richey v. AutoNation, Inc.* (2015)

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[5] It is undisputed, for instance, that Wyatt did not interview for any City Planner positions after he was rejected in November 2013.

60 Cal.4th 909, 920, fn. 3; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31 [adhering "to the familiar rule that '*possible theories not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal*'"].) Wyatt's summary judgment opposition papers in the trial court make no reference to equitable tolling or equitable estoppel. Nor does his supplemental briefing submitted in the trial court after this court issued an alternative writ. Wyatt concedes his attorney never uttered the words "equitable estoppel" in the trial court, but he contends he adequately raised an equity-based argument for deeming his DFEH complaint timely because his attorney highlighted language in the City's rejection notice during the hearing the trial court held when deciding whether to comply with the alternative writ. The non-specific remarks by Wyatt's attorney about the City's rejection notice, however, were insufficient to alert the trial court that he was relying on an equitable estoppel theory (or was it an equitable tolling theory?) and preserve the issue for appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 [purpose of the forfeiture rule is to encourage parties to bring issues to the attention of the trial court, so that any errors may be corrected].)

Both equitable theories are also inapplicable on the merits in any event. Equitable tolling is a judicially created doctrine "'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*).) The doctrine is most frequently invoked when a complainant, possessing several legal remedies, reasonably and

in good faith pursues one designed to lessen the extent of his injuries, but it is not limited to that scenario. (*J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 650, 658 (*J.M.*).) A showing of timely notice, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the complainant, however, are invariably required. (*McDonald*, *supra*, at p. 102.) For equitable estoppel to apply, a complainant must at least show "'(1) the party to be estopped must be apprised of the facts; (2) [that party] must intend that his conduct shall be . . . acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citations.]" (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1359.) Absent from the summary judgment record is any *evidence* Wyatt relied on the statements in the City's rejection notice to his detriment—his declaration admitted in evidence never even mentions the notice. Without any evidence of reliance, Wyatt has not established a triable issue of fact about whether equity requires his late DFEH complaint to be deemed timely; rather, as in *J.M.*, all we have is a "simpl[e] fail[ure] to comply with the [administrative statute of limitations]." (*J.M.*, *supra*, at p. 658.)

DISPOSITION

The judgment is affirmed. The City of Los Angeles shall recover its costs on appeal.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.